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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ORIGINAL
FILE

In the Matter of)

Rules and Regulations Implementing)
the Telephone Consumer Protection)
Act of 1991)

CC Docket No. 92-90

COMMENTS OF U S WEST COMMUNICATIONS, INC.

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SUMMARY

USWC¹ herein supports those petitioners who seek interpretation of the phrase "prior express invitation or permission," as used with regard to the facsimile transmissions provisions of the Telephone Consumer Privacy Act ("TCPA"). While the Commission does not possess the unbridled ability to create exemptions to the TCPA facsimile transmission prohibitions, it is -- as the expert agency overseeing the implementation of certain Communications Act provisions, as well as the harmonization of newer provisions with more long-standing ones -- authorized to interpret material terms and required to work towards the minimization of constitutional challenges to provisions of the Act. To avoid unwarranted constitutional infirmities associated with the TCPA, the Commission should construe the prohibitions found therein in the least restrictive way possible.

USWC also supports those petitioners who argue that the Commission should clarify that an existing business relationship between a debtor and a creditor cannot be unilaterally severed by an expression of termination from a debtor. Finally, USWC supports those petitioners who argue that the rules could benefit from an explicit provision stating that "predictive" autodialers are exempted from the definition of "autodialers" or "automatic telephone dialing systems;" or from an exemption from the identification requirements of Section 64.1200(d).

¹All abbreviations used in this Summary are fully identified in the text.

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COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("USWC"), through counsel and pursuant to the Federal Communications Commission's ("Commission" or "FCC") Rule 1.429,¹ hereby comments on certain Petitions for Reconsideration ("PFR") filed with the Commission in reference to its recently-promulgated Report and Order,² in the above-captioned docket.

I. INTRODUCTION

Below, USWC supports those petitioners³ who seek interpretation of the phrase "prior express invitation or permission," as used with regard to the facsimile transmission provisions of the Telephone Consumer Privacy Act ("TCPA").⁴ That phrase should be interpreted similarly within the integrated TCPA

¹47 C.F.R. § 1.429.

²FCC 92-443, rel. Oct. 16, 1992 ("TCPA Order").

³Petitions were filed on November 23, 1992 by the Consumer Electronics Group of the Electronic Industries Association ("EIA/CEG"), the Direct Marketing Association ("DMA"), the Fair Fax Coalition ("Coalition"), Xpedite Systems, Inc. ("Xpedite"), Reese Brothers, Inc. ("Reese"), Household International ("Household") and USWC.

⁴Pub. L. No. 102-243, 105 Stat. 2394 (1991).

and similarly to other like terms.⁵

While the Commission does not possess the unbridled ability to create exemptions regarding facsimile transmissions of unsolicited advertising, it is -- as the expert agency overseeing the implementation of certain Communications Act provisions, as well as the harmonization of newer provisions with more long-standing ones -- authorized to interpret material terms and required to work towards the minimization of constitutional challenges to the Act. To avoid unwarranted constitutional infirmities associated with the TCPA, the Commission should construe the prohibitions found therein in the least restrictive

⁵Both the TCPA, and the Commission's implementing rules, twice contain the phrase "prior express invitation or permission[.]" § 227(a)(3), § 64.1200(f)(3) (with reference to the definition of the term "telephone solicitation"); and § 227(a)(4), § 64.1200(f)(5) (with reference to the definition of "unsolicited advertisement[.]"). The term "prior express consent" is used twice in the statute and three times in the Commission's implementing rules. See § 227(b)(1)(A), § 64.1200(a)(1) (with regard to the prohibition of autodialed or prerecorded calls to certain protected classes of telephone subscribers); and § 227(b)(1)(B), § 64.1200(a)(2) (with regard to the initiation of telephone calls to residential consumers generally, where the telephone call involves an artificial or prerecorded voice); and § 64.1200(e)(iii) (with regard to internal do-not-call lists).

Neither Congress nor the Commission appear to differentiate between the phrases "prior express invitation or permission" and "prior express consent." For example, while discussing generally the Commission's proposed Rules §§ 64.1200(a)-(d) (sections which use the term "prior express consent"), the Commission observed that "If a call is otherwise subject to the prohibitions of § 64.1200, persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." TCPA Order at ¶ 31. From this flexible substitution of terms, USWC assumes that the Commission sees no material differences between the terms "prior express consent" and "prior express invitation or permission." Nor do we believe the Commission should presume a material difference.

way possible.

USWC also supports those petitioners who argue that the Commission should clarify that an existing business relationship between a debtor and a creditor cannot be unilaterally severed by an expression of termination from a debtor.

Finally, USWC supports those petitioners who argue that the rules could benefit from an explicit provision stating that "predictive" autodialers are exempted from the definition of "autodialers" or "automatic telephone dialing systems;"⁶ or that predictive autodialers that deliver de minimis "please hold" messages are exempt from the Commission's identification requirements, outlined in Section 64.1200(d).

II. THE PHRASE "PRIOR EXPRESS INVITATION OR PERMISSION," AS USED IN THE FACSIMILE MESSAGE PROVISION OF THE TCPA AND THE COMMISSION'S RULES, SHOULD BE INTERPRETED BROADLY TO ALLEVIATE CONSTITUTIONAL INFIRMITIES THAT MIGHT OTHERWISE BE CREATED

The TCPA, as drafted by Congress, prohibits the transmission of "unsolicited" advertising via a facsimile machine to an entity, unless that entity has evidenced its "prior express invitation or permission" to receive the advertisement or allow its transmission.⁷ As indicated in our opening comments, such an absolute ban on commercial speech implicates certain

⁶See § 64.1200(f)(1).

⁷Section 227(a)(3). In essence, the TCPA absolutely bans the transmission of "unsolicited" advertising via facsimile -- because the prior express acts of the recipient amount to the advertising being deemed "solicited."

constitutional rights.⁸

While the Commission has deemed itself without authority to create exemptions to the TCPA -- given the categorical nature of the Congressional language -- it did "interpret" the phrase "prior express invitation or permission" to encompass those situations where there was an existing business relationship between the sender and the recipient of the advertising.⁹ Those petitioners seeking reconsideration ask that the Commission extend its interpretation of the phrase "prior express invitation or permission" to include other factual scenarios, in addition to an existing business relationship.

Petitioners ask that the Commission construe the phrase "prior express invitation or permission" to include those circumstances in which the recipient of the facsimile advertisement has advertised or provided its fax number to individuals or the public;¹⁰ and to encompass those circumstances

⁸In USWC's original comments in this proceeding, we noted that the "inability of a commercial enterprise to call a party with whom [it has] no existing business relationship might . . . present constitutional problems." Comments of U S WEST Communications, Inc., filed herein May 26, 1992, at 2 n.3.

⁹See TCPA Order at n.87 and ¶ 34 (stating that an existing business relationship can be construed as "invit[ing] or permitt[ing]" contact by either party to the relationship). In arriving at this interpretation, the Commission adopted one of the arguments/proposals made by Mr. Fax in its comments filed in this proceeding on May 26, 1992. See Comments of Mr. Fax at 3, 8 and n.1, 14-17. And see generally Ex Parte Presentation of Mr. Fax, September 8, 1992.

¹⁰See Petition of Xpedite at 2-3, 13-15. This request corresponds to the Commission's existing finding that a person who knowingly releases a phone number to a third party has "in
(continued...)

in which the recipient is advised that a facsimile advertisement is proposed to be sent, and is provided a toll-free number to call to avoid the transmission.¹¹

The above proposals outlining how an "express invitation or permission" could be evidenced are reasonable and sound for the marketplace. While it is clear that the Commission must give substantive import to the provisions of the TCPA, there are other Communications Act provisions that must also be weighed in the balance. The Commission must not unduly restrain facsimile technology, or the relationships attendant to such technology, by overreaching regulations. Rather, the Commission must attempt to craft its regulations in a manner that still permits "the policy

¹⁰(...continued)
effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." TCPA Order at ¶ 31. As the Commission noted, there is legislative history support for this proposition. Id. at n.57.

¹¹See Petition of Fair Fax at 3-9; Petition of Xpedite at 2-3, 13. This proposal could be fine-tuned even further by restricting the non-advertisement facsimile message to a single page and requiring that it be transmitted during off-peak business hours.

Since the facts before this Commission indicate that only 3 in 1000 customers even find unsolicited advertising to be problematic (see Comments of National Fax List, filed May 26, 1992, at 2); that the majority of such advertising is done during off-peak hours (id.); and that the cost of paper is relatively insubstantial given the other costs of running facsimile machines (id.) (about three cents a sheet). See also Comments of Mr. Fax, at 3-4, 11 n.2, 15 n.3; even with the older machines, the paper cost was only about five cents a sheet, and with the newer "plain paper" models the cost is decreasing), the above could well represent a reasonable time, place and manner restriction, while still permitting -- for substantial part -- normative business/commercial relations.

of the United States to encourage the provision of new technologies and services to the public[]"¹² to be realized.

Furthermore, given the questionable constitutional nature of the Congressional ban if the TCPA's facsimile content prohibitions are broadly construed,¹³ the Commission should seek to interpret the statute in the manner that is the least restrictive to established business practices. It should attempt to craft reasonable, and workable, "time, place and manner" restrictions. Indeed, such was the expectation of the Executive Branch when the TCPA was signed into law.¹⁴

Especially in light of the fact that the Commission has already deemed it appropriate to append one interpretative gloss on the otherwise absolute statutory language,¹⁵ USWC would encourage the Commission to do likewise with the other suggestions offered by the petitioners. Just as the Commission reasonably extended the concept of "existing business relationship" from autodialed calls to facsimile transmissions, it should extend the concept of telephone number publication as representing "invitation or permission to be called"¹⁶ to facsimile transmissions.

¹²47 U.S.C. § 157(a).

¹³See Comments of Mr. Fax at 5-7, 12-13. Compare Petition of Xpedite at 2, 9-11.

¹⁴See Comments of Mr. Fax at 15; Petition of Xpedite at 12 n.7.

¹⁵See TCPA Order at n.87.

¹⁶Id. at ¶ 31.

Additionally, USWC agrees with those petitioners who argue that a company should be permitted to send an unsolicited letter advising of a soon-to-be-sent advertisement.¹⁷ If the recipient does not call a toll-free number provided by the sender to decline the advertisement, the future transmission of an advertisement should be deemed supported by express invitation or permission.

While not all petitioning parties ask that the Commission adopt a specific rule defining the phrase "express invitation or permission," USWC supports the position of Xpedite that the Commission should add an explicit section to its rules defining the term.¹⁸ USWC believes that such action would serve the public interest.

Providing a specific definition in a Commission rule would allow those parties familiar with the Code of Federal Regulations ("CFR"), but less familiar with specific Commission dockets/orders, to have the material and relevant Commission construction of these Communications Act terms easily available for perusal. Further, since the Commission has already defined in its rules the term "established business relationship"¹⁹ (another material term that was devoid of statutory definition), defining this other materially important phrase would be most

¹⁷See Petition of Fair Fax at 3-9; Petition of Xpedite at 2-3, 13.

¹⁸See Petition of Xpedite at 2-3.

¹⁹See § 64.1200(f)(4).

appropriate.

III. THE COMMISSION SHOULD CLARIFY THAT ITS RULES ARE NOT MEANT TO BE READ TO SUGGEST THAT A DEBTOR CAN UNILATERALLY TERMINATE AN EXISTING BUSINESS RELATIONSHIP

USWC supports the petition filed by Household, which asks that the Commission clarify that an "existing business relationship" between a creditor and a debtor cannot be unilaterally terminated by a debtor on a whim.²⁰ Household's suggested clarifications are eminently reasonable and should be adopted.

The Commission should clarify that a consumer is free to sever an existing business relationship with a particular business enterprise for the purpose of avoiding future "uninvited solicitations to new transactions";²¹ but that the "continued existence of an unpaid debt affords a creditor an 'existing business relationship' exemption for debt collection calls, despite any attempt by the debtor to 'terminate' or 'sever' the relationship for other purposes."²² As the Commission has pointed out, this would comport with the relevant legislative history.²³

²⁰See Petition of Household at 2-5. This clarification is necessary because the Commission, in a number of places in its TCPA Order, discusses how a consumer might "sever" or "terminate" a business relationship with some ease. See Petition of Household at 3-4 and nn.6-7.

²¹Id. at 4.

²²Id.

²³See TCPA Order at n.72.

IV. THE DEFINITION OF "AUTODIALER" AND "AUTOMATIC TELEPHONE DIALING SYSTEM" SHOULD BE AMENDED TO EXEMPT PREDICTIVE AUTODIALERS OR § 64.1200(d) SHOULD PROVIDE AN EXEMPTION FOR DE MINIMIS "PLEASE HOLD" MESSAGES DELIVERED BY SUCH MACHINES, IN CONJUNCTION WITH LIVE OPERATOR CONNECTIONS

During the course of these proceedings, a number of commentators suggested special treatment for "autodialers" that were used in a "predictive" mode,²⁴ rather than a random one.²⁵ USWC would encourage the Commission to create such a specific exemption. Predictive autodialers are not the kind of technology that Congress sought to control, do not present the same kind of consumer relations problems as random autodialers utilizing lengthy prerecorded messages, and produce tremendous economic efficiencies and overall commercial benefit to businesses that use them.

Predictive autodialers place telephone calls to telephone numbers programmed into the machine. If no answer is received from the calling party, the machine hangs up and calls the next pre-programmed number. If an answer is received, the calling

²⁴See Comments of Digital Systems International, Inc. ("Digital Systems"), filed herein May 26, 1992, passim; Comments of Household, filed herein May 26, 1992, at 7-10; Comments of American Bankers Association, filed herein May 26, 1992, at 2; Comments of American Collectors Association, filed herein May 26, 1992, at 5-8, 10.

²⁵In some circumstances, it appears that the most salient feature of "predictive systems" is that they do not operate randomly. See Petition of Household at 6; Comments of Digital Systems at 6. In other circumstances, the most salient aspect appears to be the synthesis between the dialing activity and the connection to live operators. See Comments of Digital Systems at 3, 5-6.

party "pick up" is followed by (a) silence; or (b) a short "please hold" request,²⁶ while an attempt is made to connect the answering station with a live operator.

While predictive autodialers may dial in a sequence,²⁷ they do not generally dial numbers randomly. Rather, the dialed numbers are chosen with some particularity by the calling party.²⁸ In most cases, a party's ability to choose particular numbers to be called will be based on the fact that there is an existing or prior business relationship.

While the TCPA (and the Commission's proposed rules) define the terms "autodialer" and "automatic telephone dialing system" to include machines that have certain capacities, i.e., to store and to dial telephone numbers using a "random or sequential number generator,"²⁹ it seems obvious that the kind of calls Congress meant to prohibit were those calls made randomly and sequentially to large blocks of telephone numbers, regardless of whether or not there was any relationship between the caller and the called party. The kinds of calls generally made by predictive autodialers are not of this nature.

²⁶See Comments of Digital Systems, Inc. at 6-7.

²⁷The way that the TCPA is written, as well as the Commission's corresponding rules, these kinds of autodialers are currently included in the definition, in part, because of the use of the word "or" in the phrase "random or sequential." See § 227(a)(1); § 64.1200(f)(1).

²⁸See Household's reference to calls made to particular debtors. Petition of Household at 6.

²⁹See, e.g., § 227(a)(1) (emphasis added); Rule 64.1200(f)(1).

USWC agrees with Household that the Commission's definition of "autodialer" and "automatic telephone dialing system," describing -- as it does -- "capacit[ies]" rather than "uses," causes its definition to encompass machines that operate both in a random or a predictive mode.³⁰ USWC would support, as Household suggests, a specific exemption from the definition of "autodialer" for "predictive" machines, on the grounds that the material element associated with offensive autodialing machines is their random and sequential dialing activities (rather than theoretical capacities) and their total dissassociation from live operators. Thus, we would encourage the Commission to amend its Section 64.1200(f)(1) to define such machines as those involving "random and sequential dialing activities and which are not associated with live operator connections."

Should the Commission not be inclined to exempt predictive autodialers from the definition of autodialer per se, the Commission should create a permanent exemption to the identification requirements found in § 64.1200(d) for such machines when used in conjunction with live operators. The use of such machines produces tremendous business efficiencies, which should not be lost due to overbroad definitions or provisions in the Commission's rules implementing the TCPA. While technically an "autodialer" as that term is statutorily defined,³¹ predictive

³⁰ See Petition of Household at 6.

³¹ The Commission dismisses certain observations by commenting parties about identification requirements associated
(continued...)

autodialers are not highlighted in the legislative history as the kind of machines that produce overall public annoyance.

Furthermore, the de minimis nature of the short "please hold" message should be accorded some significance.

In the alternative, predictive autodialers utilized to call persons with whom there is an existing business relationship, and which deliver short "please hold" messages, should be exempted from the identification requirements of § 64.1200(d). Allowing predictive autodialers to be used to deliver short prerecorded messages to called parties with whom the caller has an established business relationship would do no violence to Congressional intent,³² and the Commission should amend its proposed rules accordingly.

³¹(...continued)
with debt collectors by stating that no identification is required because such calls are not made by autodialers. As Household points out, this is not correct. See Comments of Household at 5-7. The machines used by Household, as well as many other businesses, would qualify as "autodialers" under either the TCPA or the Commission's rules. Thus, the pertinent identification requirements would come into play. See § 64.1200(d) and § 227(d)(3).

During the course of the Commission's observations, it cited to its Rule 64.1200(3)(4). In the Commission's current rule iteration, there is no such rule. The rule is 64.1200(4)(iv). And, that rule involves identification requirements for "telephone solicitations." Because calling parties having an existing business relationship with called parties are not making "telephone solicitations" (as that term is defined in 64.1200(f)(3)), the Commission did not need to reference "autodialers" as the source of the identification "exemption." The Commission should clarify this rule reference.

³²Compare TCPA Order at n.72.

V. CONCLUSION

For the above-stated reasons, USWC supports those petitioners seeking an explicit rule defining the term "prior express invitation or permission." The public interest would be advanced by the establishment of a publicly-available Commission rule with regard to this material term.

Additionally, USWC supports the petition of Household, which argues that a debtor should not be permitted to unilaterally sever an existing business relationship while there is an outstanding debt. We also support the arguments of Household that the Commission's rules should be revised such that predictive autodialers are generally exempted from the impact of the Commission's rules, most particularly the identification requirements. Given the de minimis nature of the message transmitted, and the tremendous commercial benefit of such machines and their associated messages, the cost of doing the kind of identification contemplated by Section 64.1200(d) is unwarranted and overreaching.

Respectfully submitted,

U S WEST Communications, Inc.

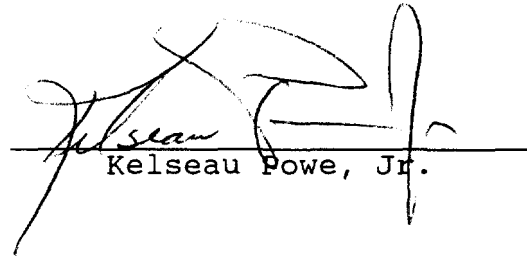
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I, Kelseau Powe, Jr., do hereby certify on this 4th day of January, 1992, that I have caused a copy of the foregoing **PETITION FOR CLARIFICATION OR RECONSIDERATION** to be served, via first class United States mail, postage prepaid, to the persons named on the attached service list.


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